Alabama, Univ. of Delaware, Indiana Univ., Univ. of Kansas, Leland Stanford Jr. Univ., Univ. of Maine, Mass. Institute of Technology, Univ. of Nebraska, Oxford Univ., Swarthmore Coll., United States Military Academy, Washington & Jefferson Coll., Washington & Lee University, West Virginia Univ., 2; Allegheny Coll., Univ. of Arkansas, Cambridge Univ. (England), Case School of Applied Science, Clark Coll., Clarkson Coll. (Ky.), Colby Coll., Colorado Coll., Univ. of Colorado, De Pauw Univ., Dickinson Coll., Fairmount Coll., Fordham Univ., Furman Coll., George Washington Univ., Gonzaga Univ. (Wash.), Grinnell Coll., Hamline Univ., Havana Univ., Haverford Univ., Hope Coll., Lehigh Univ., Middlebury Coll., Mississippi Agr. & Mech. Coll., Univ. of Mississippi, Missouri State Teachers Coll., Univ. of Missouri, Univ. of Montana, Morningside Coll., Mount Allison Univ., Univ. of Nevada, North Dakota Agr. Coll., Univ. of Oklahoma, Univ. of Oregon, Pennsylvania State Coll., Purdue Univ., Univ. of Redlands, Rice Institute, Rutgers Coll., St. John's Coll. (Md.), St. Louis Univ., Univ. of the South, Univ. of Southern California, Univ. of Tennessee, Univ. of Texas, Tufts Coll., Tulane Univ., Ursinus Coll., Vanderbilt Univ., Washington Coll., Westminster Coll., Wofford Coll., 1.

THE SERVICE LETTER LAWS. — "We have attempted merely to indicate sufficient grounds upon which they might reasonably have acted . . . to show that it is not demonstrated that they acted arbitrarily, and hence that there is no sufficient reason for holding that the statute deprives the corporation of its liberty or property without due process of law." [1] In thus disposing of its first case on the constitutionality of the Service Letter Laws, the United States Supreme Court reasserts its consciousness of the relation of the courts to "police" legislation. Articulated by Chief Justice Marshall,[2] this consciousness has been constantly reiterated by succeeding courts; [3] but it has been practically denied by the iron-bound conception of liberty which has followed interpretation of the Fourteenth Amendment.[4] The extending labor legislation of the past fifty years

[1] Mr. Justice Pitney in Prudential Insurance Co. *v.* Cheek, 42 Sup. Ct. Rep. 516, 523 (1922). For the facts of this case see RECENT CASES, *infra*, p. 216.

[2] See McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 421 (1819).

[3] See Holden *v.* Hardy, 169 U. S. 366, 395 (1898); Booth *v.* Illinois, 184 U. S. 425, 429 (1902); Chi., B., & Q. Ry. Co. *v.* McGuire, 219 U. S. 549, 569 (1911); Block *v.* Hirsh, 256 U. S. 135, 158 (1921).

[4] Allgeyer *v.* Louisiana, 165 U. S. 578 (1897); Lochner *v.* New York, 198 U. S. 45 (1905); Coppage *v.* Kansas, 236 U. S. 1, 19 *ff.* (1915); Opinion of the Justices, 220 Mass. 627 (1915). See Roscoe Pound, "Liberty of Contract," 18 YALE L. J. 454. It is now clear that the term "liberty" includes the freedom of contract. Allgeyer *v.* La., *supra*; Lochner *v.* N. Y., *supra*. It is equally clear that these rights are not absolute, but recede before the exercise of the "police power." McLean *v.* Arkansas, 211 U. S. 539 (1909). See FREUND, POLICE POWER, 308, §§ 498–503. See 28 HARV. L. REV. 496. Less definite are the limits of this power: what acts aim "directly to secure and promote public welfare," and what acts are unreasonable or arbitrary in the attainment of those aims, are troublesome questions. See Lochner *v.* N. Y., *supra*, 57, 61. See George W. Wickersham, "The Police Power: A Product

has recurrently encountered the "due process" clause.[5] In the conflict between the interests of the "individualists" and the interests seeking expression and protection through legislation, a storm has settled about the reviewing courts. This conflict, tinged with individual feelings and economic theory,[6] has silhouetted the constitutional principle of freedom of contract against the sky of a sociological era, and caused jurists to ponder the attitude of the courts toward legislation.[7]

The Service Letter Laws [8] are aimed to remedy a wide-spread industrial evil among laborers in aggravated unemployment and hardship, "black-listing." [9] These laws have met the obstructions common to all legislative innovations. The federal government enacted a law of limited scope in 1872.[10] Eight states [11] have since adopted similar legislation. In every state in which the question has been litigated prior to the present decisions the statute has been held repugnant to the due process clause.[12] The arguments urged against the validity of the legislation are four: (1) that the requirement of the statement of a "true cause" impliedly prohibits discharge without cause, and thereby limits the freedom of contract; [13] (2) that the liberty to speak includes the correlative right to remain silent; [14] (3) that the statute, in that it *compels* one to speak, denies

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of The Rule of Reason," 27 HARV. L. REV. 297. Authorities agree that the exercise of the "police power" is subject to judicial review. McLean *v.* Arkansas, *supra*; Chi., B., & Q. Ry. Co. *v.* McGuire, *supra*, 569.

[5] See authorities cited *supra*.

[6] See Learned Hand, "Due Process of Law and the Eight Hour Day," 21 HARV. L. REV. 495, 500–501.

[7] For significant expressions of this and related problems, see Learned Hand, *supra*, 21 HARV. L. REV. 495; Francis J. Swayze, "Judicial Construction of the Fourteenth Amendment," 26 HARV. L. REV. 1; Geo. W. Wickersham, *supra*, 27 HARV. L. REV. 297; Felix Frankfurter, "Hours of Labor and Realism," 29 HARV. L. REV. 353; Chas. M. Hough, "Due Process of Law—To-day," 32 HARV. L. REV. 218; Geo. W. Wickersham, "Police Power and the New York Emergency Rent Laws," 69 U. OF PA. L. REV. 301.

[8] For a typical statute, see Prudential Ins. Co. *v.* Cheek, *supra*, and Chi., R. I., & Pac. Ry. Co. *v.* Perry, 42 Sup. Ct. Rep. 524 (1922), RECENT CASES, *infra*, p. 216.

[9] For the conditions which have motivated these laws, see Cheek *v.* Prudential Ins. Co., 192 S. W. 387, 389 (Mo. 1917); St. Louis, S. W. Ry. Co. of Texas *v.* Hixon, 126 S. W. 338, 342 (Tex. 1910).

[10] See Act June 7, 1872, c. 322, § 24; U. S. REV. STAT. § 4551. The act applied only to seamen.

[11] See 1891 GEORGIA ACTS, vol. 1, p. 188; 1914 IND. STAT. (BURNS ANN.) § 8009; 1915 KAN. GEN. STAT. (MCINTOSH) § 5950; 1919 MO. REV. STAT. § 9780; 1921 MONT. REV. CODES (CHOATE) § 3094; 1913 NEB. REV. STAT. § 3572; OKLA. REV. LAWS § 3769; TEX. REV. CIVIL STAT., Art. 594.

[12] Wallace *v.* Ga., C., & N. Ry. Co., 94 Ga. 732, 22 S. E. 579 (1894); Atchison, T., & S. F. Ry. Co. *v.* Brown, 80 Kan. 312, 102 Pac. 459 (1909); St. L., S. W. Ry. Co. *v.* Griffin, 106 Tex. 477, 171 S. W. 703 (1914) (overruling St. L., S. W. Ry. Co. *v.* Hixon, 126 S. W. 338 (Tex. Civ. App. 1910), reversed in 137 S. W. 343 (1911) on non-constitutional grounds); Galveston, H. & S. A. Ry. Co. *v.* King, 174 S. W. 335 (Tex. 1915); Galveston, H. & S. A. Ry. Co. *v.* State, 175 S. W. 1096 (Tex. 1915).

[13] St. L., S. W. Ry. Co. *v.* Griffin, *supra*.

[14] Atch. T. & S. F. Ry. Co. *v.* Brown, *supra*; Wallace *v.* Georgia, C. & N. Ry. Co., *supra*.

the right guaranteed by the state constitution that one may *freely* speak;[15] (4) that the statute abridges the "fundamental" rights of terminating the contract of employment at will, with or without cause, and not divulging the reasons.[16] It is a sufficient answer to the first that it is a false interpretation. A denial of the second and third scarcely needs authority. The fourth objection begs the question as to whether these rights are alterable by statute.[17] Obviously every change ever initiated in the law deprived every man of his then existing liberty, the liberty from the duties newly imposed, the rights newly created. The result of this abstract approach is not justice.[18]

Granting that the "police power" survived the passing of the Fourteenth Amendment, the proper question becomes: Is this statute within the scope of that power? To answer this we ask: (1) What was its purpose; and (2) are the means to that end unreasonable and arbitrary.[19] In this review of legislation the attitude and method of approach of the court are of prime importance, and should be considered with separate reference to each of the above questions. At the outset, the attitude of the court should be one of disinclination to review an act of the legislature.[20] As a matter of policy, the courts very properly presume that a statute is constitutional. But this policy, generally enunciated,[21] is in effect denied by abruptly deciding a case on an abstract principle taken as absolute.[22] A judicial proceeding inherently implies consideration of all pertinent facts. The presumption being overthrown, the court should demand the complete factual background of the legislation.[23]

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[15] Atch., T. & S. F. Ry. Co. *v.* Brown, *supra*.

[16] See Prudential Ins. Co. *v.* Cheek, *supra*.

[17] An enlargement of this argument speaks of the right to be "silent and safe" and free from burdensome litigation following inaccurate service letters innocently based on misinformation. Atch., T. & S. F. Ry. Co. *v.* Brown, *supra*.

[18] See Roscoe Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605.

[19] See Holden *v.* Hardy, *supra*, 398; Booth *v.* Ill., *supra*, 429; Marcus Brown Holding Co. *v.* Feldman, 269 Fed. 306, 316 *ff.* (S. D. N. Y., 1920).

[20] "We have no concern with the question whether those means were the wisest." *Per* Holmes, J., in Block *v.* Hirsh, 256 U. S. 135, 158 (1921).

[21] Marcus Brown Holding Co. *v.* Feldman, *supra*; aff'd in 256 U. S. 170 (1921). Authorities are collected in BLACK, CONSTITUTIONAL LAW, 3 ed., 68. See, for the classic utterance of this policy, THAYER, LEGAL ESSAYS, 1, 20, *et seq.*

[22] See Lochner *v.* N. Y., *supra*. This statement is illustrated by a contrast of the opinion and the dissent of Mr. Justice Holmes and Mr. Justice McKenna respectively, in Block *v.* Hirsh, *supra*. "They are as absolute as maxims," Mr. Justice McKenna, *ibid.*, 163.

[23] Contrast the method of approach by the court in Lochner *v.* N. Y., *supra*, and Muller *v.* Oregon, 208 U. S. 412 (1908); Ritchie *v.* People, 155 Ill. 98 (1895), and Booth *v.* Ill., *supra*; Coppage *v.* Kansas, *supra*, and Holden *v.* Hardy, *supra*; Adams *v.* Tanner, 244 U. S. 590 (1917), and Walls *v.* Midland Carbon Co., 254 U. S. 300 (1920); Opinion of the Justices, *supra*, and Block *v.* Hirsh, *supra*; Adair *v.* U. S., 208 U. S. 161 (1908), and Chi., B. & Q. Ry. Co. *v.* McGuire, *supra*. From the very definition of "police power," it seems paradoxical to consider a "police" measure without the facts of the time which determine its reasonableness. See Marcus Brown Holding Co. *v.* Feldman, *supra*, 317. See Felix Frankfurter, *supra*, 29 HARV. L. REV. 353, 365. Courts take judicial notice of facts of common knowledge. See Muller

The purpose of the Service Letter Laws, the protection of the right to obtain employment, a right recognized by the common law,[24] is clearly within the scope of the "police power." Its "public" nature appears from a consideration of the effects of non-protection of the right.[25] The court's attitude in the second phase of judicial review, the treatment of the means as not plainly unadapted to attaining legitimate ends, follows naturally. The proper approach must be that of the principal case: Are the means to the end, the particular enactment, plainly arbitrary or unreasonable? The individual seeking expression of his legitimate interests has three avenues: the courts, applying principles snatched from the nebula of the common law, — but the common law has never recognized a duty to give a service letter; [26] contractual bargaining with the employer, — but the inequality of the parties in this respect has long been recognized; [27] and the legislature, where the fundamental principles undergo a process of creative adaption to the changing conditions of life, affording, therefore, the only practicable means of securing this protection.

The court having at the outset refused to consider legislative motives,[28] now simply gives ear to interests which have not been protected, and asks: Have other interests, such as individual freedom of contract, been sacrificed? And, further, is the sacrifice, if any, so great as to nullify the social gain from the legislation? The service letter cases are comparatively easy because of a probable negative answer to the former question. The answer to the latter is clearly negative.[29] The Supreme Court in adopting the tests here set forth reaches a healthful result,[30] indicative of the growing tendency away from the judicial "veto" of social legislation.

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v. Oregon, *supra*, 420–421. But the experience of the letter laws demonstrates the sad truth that "common knowledge" among the judges of the "facts of life" follows the actual existence of those facts by the interval between the passing of the act and the supporting decision, here decades of retrogression.

[24] This right was recognized by giving damages for the libellous destruction thereof. See Cheek *v.* Prud. Ins. Co., *supra*, 393. See COOLEY, TORTS, 2 ed., 328.

[25] See cases, note 9, *supra*.

[26] Cleveland, C. C. & St. L. Ry. Co. *v.* Jenkins, 174 Ill. 398, 51 N. E. 811 (1898).

[27] See Holden *v.* Hardy, 169 U. S. 366, 397 (1898).

[28] *Cf.* 35 HARV. L. REV. 859.

[29] One further argument urged in opposition is that legislation favoring a class is undesirable. Lochner *v.* New York, *supra*. But reasonable "police" legislation subjected to the foregoing judicial tests serves only to prevent the parasitic growth which it is charged with furthering. See Roscoe Pound, *supra*, 18 YALE L. J. 454.

[30] "Whether the enactment is wise or unwise, whether it is the best means to achieve the desired result, whether in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *Per* Justice Hughes, Chi., B. & Q. Ry. Co. *v.* McGuire, *supra*, 569. See Adair *v.* United States, *supra*, 187.